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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Maria D. Robles,

10 Plaintiff,

11 vs.

12 JoAnne Barnhart, Commissioner of
13 the Social Security Administration,

14 Defendant.
15
16

No. Civ. 04-2882-PHX-MS

ORDER

17 This social security disability benefits case comes before the Court on
18 Plaintiff's Motion for Summary Judgment¹ [Doc. 13] and Defendant's Motion for
19 Remand [Doc. 21]. The Court now remands this matter for further proceedings.

20 **I. Procedural Background**

21 Plaintiff applied for Disability Insurance Benefits and Supplemental Security
22 Income benefits in March, 2002, alleging a disability onset date of November, 2001.
23 [Doc. 14 at 1; Doc. 6A at 58, 293]. Her claims were denied initially and on
24 reconsideration. [Doc. 14 at 2]. Plaintiff obtained a hearing before an Administrative
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26 ¹ The full title of Plaintiff's motion is Motion for Summary Judgment on
27 Complaint for Judicial Review of Administrative Determination of Claims
28 for a Period of Disability, Disability Insurance Benefits, and
Supplemental Security Income Based on Disability. [Doc.13].

1 Law Judge ("ALJ"), who issued an unfavorable decision on October 31, 2003. [Doc.
2 14 at 2; Doc. 6A at 15-25]. On October 15, 2004, the Appeals Council denied
3 Plaintiff's request for review, and the ALJ's decision became the final decision of the
4 Social Security Commissioner for purposes of judicial review. [Doc. 14 at 5; Doc. 6A
5 at 8-10].

6 Plaintiff filed a Complaint in this Court on December 14, 2004 [Doc. 1], and
7 a Motion for Summary Judgment on June 13, 2005. [Doc. 13]. Defendant opposed
8 the motion and filed a Motion for Remand on September 7, 2005. [Doc. 21].

9 **II. Legal Framework**

10 **A. Standard of Review**

11 Because the Social Security Act confines the scope of judicial review to
12 evidence within the administrative record, the Court will treat Plaintiff's Motion for
13 Summary Judgment as a motion for reversal of the Commissioner's decision. 42
14 U.S.C. § 405(g); Higgins v. Shalala, 876 F. Supp. 1224, 1226 (D. Utah
15 1994)(collecting cases and discussing the appropriate treatment of summary
16 judgment motions requesting review of administrative decisions). The appropriate
17 standard of review is whether the ALJ's findings of fact are supported by substantial
18 evidence and whether the denial of benefits was free from legal error. Smolen v.
19 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Flaten v. Sec'y of Health & Human
20 Servs., 44 F.3d 1453, 1457 (9th Cir. 1995). Substantial evidence is "relevant
21 evidence as a reasonable mind might accept as adequate to support a conclusion."
22 Smolen, 80 F.3d at 1279 (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971));
23 accord Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989). To determine
24 whether substantial evidence exists to support an administrative decision, the Court
25 must "review the administrative record as a whole, weighing both the evidence that
26 supports and detracts from the [ALJ]'s conclusion." Magallanes, 881 F.2d at 750.

27 If the evidence can support either affirming or reversing the ALJ's decision, the
28 Court must uphold the decision. Moncada v. Chater, 60 F.3d 521, 523 (9th Cir.

1 1995). However, reviewing courts cannot accept post hoc rationalizations for
2 agency action. See, e.g., NLRB v. Metro. Life Ins. Co., 380 U.S. 438, 444 (1965);
3 Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir. 2001). Thus, the ALJ's decision must
4 be upheld, if at all, on the grounds articulated in the order by the ALJ. Pinto, 249
5 F.3d at 847.

6 **B. Regulatory Disability Standards**

7 To qualify for disability benefits under the Social Security Act, a claimant must
8 show that: (1) she suffers from a medically determinable physical or mental
9 impairment that can be expected to result in death or that has lasted or can be
10 expected to last for a continuous period of not less than twelve months; and (2) the
11 impairment renders the claimant incapable of performing work previously performed
12 and incapable of performing any other substantial gainful employment that exists in
13 the national economy. 42 U.S.C. §§ 423(d)(1)(A), 423(d)(2)(A); Tackett v. Apfel, 180
14 F.3d 1094, 1098 (9th Cir. 1999). The Social Security Regulations set forth a five-step
15 sequential process for evaluating disability claims. See 20 C.F.R. § 404.1520. A
16 claimant's claim of disability can be rejected at any stage of the sequential process.
17 Id.; § 404.1520. The claimant bears the burden of proof at steps one through four
18 of the sequential process. 42 U.S.C. § 423(d)(5); Reddick v. Chater, 157 F.3d 715,
19 721 (9th Cir. 1998). The burden shifts to the Commissioner at step five. Reddick,
20 157 F.3d at 721.

21 At step one of the sequential process, the ALJ determines whether the
22 claimant is currently engaged in substantial gainful activity. Tackett, 180 F.3d at
23 1098; § 404.1520(b). At step two, the ALJ determines, based on the medical
24 evidence, whether the claimant has a "severe impairment." Id.; § 404.1520(c). If the
25 claimant's impairment is not severe, then the claimant will not be considered
26 disabled. If the impairment is severe, the ALJ proceeds to step three and
27 determines whether the impairment meets or equals a specific impairment listed in
28 the regulations. Id.; § 404.1520(d). When the impairment "meets or equals" one of

1 the specified impairments, disability will be found. When the impairment does not
2 meet or equal a specified impairment, the ALJ proceeds to step four and determines
3 whether the claimant can still perform "past relevant work." Id.; § 404.1520(e). If the
4 claimant can perform such work, the claim is denied. However, if the claimant is
5 unable to do past relevant work, the ALJ proceeds to the fifth step and determines,
6 based on the claimant's age, education, work experience and residual functional
7 capacity (RFC), whether the claimant can perform other work that exists in the
8 national economy. Id.; § 404.1520(f). If the claimant cannot, she is entitled to a
9 finding of disability.

10 **III. Discussion**

11 In this case, the ALJ considered whether Plaintiff was disabled based on her
12 allegations that: (1) her mental functioning ability was impaired, (2) she suffered
13 disabling effects from a gunshot wound to her left arm, or (3) she had depression,
14 anxiety, and an inability to read or write. [Doc. 6A at 19-23]. The ALJ found Plaintiff
15 not disabled at step four of the sequential evaluation process. [Doc. 6A at 24]. At
16 step one, the ALJ found that Plaintiff has not engaged in substantial gainful activity
17 since her alleged onset date. [Doc. 6A at 19, 24]. At step two, the ALJ found that
18 Plaintiff had borderline intellectual functioning, an impairment that was severe within
19 the meaning of the guidelines. [Id.]. However, the ALJ determined that Plaintiff's
20 alleged depression and arm injury did not amount to severe impairments. [Id. at 21,
21 23]. At step three, the ALJ determined that Plaintiff's severe impairments were not
22 severe enough to meet or medically equal one of the impairments specified in the
23 regulations. [Id. at 23-24]. At step four, the ALJ determined that Plaintiff retained
24 the residual functional capacity to perform "simple, unskilled" work at any exertional
25 level. He further determined that Plaintiff's reported limitations did not prevent her
26 from performing her past relevant work as a janitor, and that she was therefore not
27 disabled. [Id. at 24]. Having found Plaintiff not disabled at step four of the
28 sequential evaluation process, the ALJ did not reach step five.

1 Plaintiff now contends that the ALJ erred in several ways. First, Plaintiff
2 contends that the ALJ erred by finding that Plaintiff did not have a condition that met
3 or equaled the criteria for presumptive disability listed in the regulations. [Doc. 15
4 at 3-9]. Specifically, Plaintiff contends that her condition satisfied the requirements
5 of section 12.05C of the Medical Listings, 20 C.F.R. Pt. 404, Subpt. P, App. 1 §
6 12.05C (2005) ("§ 12.05C"), which addresses mental retardation. [Id.]. Second,
7 Plaintiff argues that the ALJ erred by globally assessing her residual functional
8 capacity rather than conducting a function-by-function assessment, as required by
9 Social Security Ruling 96-8p. [Id. at 9-10]. Third, Plaintiff contends that the ALJ
10 erred by relying on the Dictionary of Occupational Titles (DOT) to conclude that she
11 could return to her past work as a janitor because the DOT description is
12 inconsistent with the RFC found by the ALJ. [Id. at 10-11]. Finally, Plaintiff contends
13 that the ALJ erred by discrediting her testimony without clear and convincing
14 reasons. [Id. at 11-15].

15 Defendant concedes that a remand of this matter is appropriate. Defendant
16 contends, however, that further proceedings are required to fully assess Plaintiff's
17 impairments and determine whether she meets the requirements of § 12.05C. [Doc.
18 22]. Defendant observes that many of Plaintiff's treatment records were not
19 submitted to the ALJ until after the hearing. [Id.]. As a result, the consultative
20 examining psychologists and the medical expert did not have the benefit of
21 considering Plaintiff's treatment records. [Id.]. Defendant maintains that the lack of
22 records resulted in less than full consideration of Plaintiff's limitations, as diagnosed
23 by her treating physician, and that a remand is therefore required. [Id.]. To this end,
24 Defendant proposes that the Court direct the ALJ to do the following on remand:

- 25 1) obtain updated records from Plaintiff's medical and mental health care
26 providers; 2) further evaluate the severity of Plaintiff's upper left extremity
27 carpal tunnel syndrome and consider the state agency physician opinions
28 concerning Plaintiff's left hand limitations; (3) evaluate the severity of Plaintiff's
anxiety disorder; (4) apply the special technique set forth in 20 C.F.R. §§
404.1520a and 416.920a for the evaluation of mental impairments; (5)

1 consider whether Plaintiff meets or equals Medical Listing 12.05C; and, (6)
2 and [sic.] if appropriate, further evaluate Plaintiff's RFC.

3 [Doc. 22 at 9]. Defendant maintains that developing the record in this matter will
4 allow the ALJ, in his position as fact-finder, to better evaluate Plaintiff's impairments.
5 [Id. at 7].

6 Generally, when reversing an administrative determination, "the proper
7 course, except in rare circumstances, is to remand to the agency for additional
8 investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir.
9 2004)(quoting INS v. Ventura, 537 U.S. 12, 16 (2002) (per curiam)). Remand for
10 further consideration is appropriate where issues are unresolved and enhancement
11 of the record is required. Id.; Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003);
12 Harman v. Apfel, 211 F.3d 1172, 1178-79 (9th Cir. 2000). However, the Ninth Circuit
13 has recognized that it is both reasonable and desirable to require hearing officers to
14 articulate the grounds for discrediting testimony in the original decision. Harman,
15 211 F.3d at 1179. Thus, improperly rejected evidence should be credited and an
16 award directed when:

17 (1) the ALJ has failed to provide legally sufficient reasons for rejecting
18 such evidence, (2) there are no outstanding issues that must be
19 resolved before a determination of disability can be made, and (3) it is
clear from the record that the ALJ would be required to find the claimant
disabled were such evidence credited.

20 Smolen, 80 F.3d at 1292. See also Benecke, 379 F.3d at 593; Moisa v. Barnhart,
21 367 F.3d 882, 887 (9th Cir. 2004); Harman, 211 F.3d at 1178; Varney v. Sec'y of
22 Health & Human Servs., 859 F.2d 1396, 1401 (9th Cir. 1988).

23 **A. Section 12.05C**

24 A primary issue in this case is whether the record clearly establishes that
25 Plaintiff is entitled to a finding of disability because her impairments meet or equal
26 the requirements for disability listed in § 12.05C. Section 12.05C provides:

27 12.05 Mental retardation: Mental retardation refers to significantly subaverage
28 general intellectual functioning with deficits in adaptive functioning initially

1 manifested during the developmental period; i.e., the evidence demonstrates
2 or supports onset of the impairment before age 22.

3 The required level of severity for this disorder is met when the requirements
4 in A, B, C, or D are satisfied.

5 * * *

6 C. A valid verbal, performance, or full scale IQ of 60 through 70 and a
7 physical or other mental impairment imposing an additional and significant
8 work-related limitation of function;

9 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 12.05C (2005).

10 It is undisputed that Plaintiff's full scale IQ score, as reported by Drs. Henley
11 and Graff, falls within the 60 to 70 range. It is further undisputed that the evidence
12 demonstrates an onset of Plaintiff's impairment before age 22. The only issue to be
13 resolved under § 12.05C is whether Plaintiff suffered from physical or mental
14 impairments that imposed additional, significant, work-related limitations such that
15 she must be considered presumptively disabled at step three of the sequential
16 evaluation process.

17 As a preliminary matter, the Court rejects Plaintiff's argument that the ALJ
18 made only a boilerplate finding that Plaintiff's impairments did not meet or equal a
19 specified impairment. When the ALJ's opinion is read in its entirety, it is evident that
20 the ALJ's extensive determinations relating to the severity of Plaintiff's impairments
21 at step two of the sequential evaluation process were also considered at step three
22 of the process. [See Doc. 6A at 23] ("no treating or examining physician has
23 indicated findings that would satisfy the severity requirements of any listed
24 impairment"). The ALJ was not required to repeat his analysis under a "step three"
25 heading.

26 Plaintiff also alleges that the impairments suffered from the gunshot wound to
27 her arm and/or her mental disorders were significant enough to meet the "additional
28 and significant" limitation requirement of § 12.05C. Implicit in Plaintiff's argument is
a contention that the ALJ erred in assessing the extent of Plaintiff's limitations. The
Court therefore turns to the ALJ's assessments to determine whether the ALJ erred,

1 and if so, whether the evidence of either impairment is sufficient to entitle Plaintiff to
2 a presumptive finding of disability.

3 **1. Plaintiff's Arm Injury**

4 At step two of the sequential evaluation process, the ALJ determined that
5 objective evidence did not support a finding that Plaintiff's left arm injury had more
6 than a "minimal effect on her ability to do work." [*Id.* at 21]. In reaching this
7 conclusion, the ALJ found Plaintiff's complaints to be less than fully credible, and
8 rejected the opinion of Dr. Drinkwater, a consultative examiner. Plaintiff contends
9 that the ALJ improperly rejected both Dr. Drinkwater's assessment and her
10 complaints about her arm injury. This Court will consider each contention in turn.

11 **(a). Dr. Drinkwater's Report**

12 The ALJ rejected the opinion of Dr. Drinkwater, a consultative examiner. Dr.
13 Drinkwater opined that: Plaintiff had median distribution neuropathy; was limited to
14 lifting and carrying ten pounds occasionally and less than ten pounds frequently; had
15 a limited ability to handle, finger, and feel with her left hand; and could only
16 occasionally climb, balance, stoop, kneel, crouch, and crawl. [Doc. 6A at 20, 199].
17 The ALJ determined that Dr. Drinkwater's opinion was inconsistent with the doctor's
18 evaluation as well as with the medical evidence as a whole. [*Id.* at 20-21]. The ALJ
19 concluded that Plaintiff was right-hand dominant and could use her left hand to
20 assist with lifting and carrying. [Doc. 6A at 21]. He further found that the objective
21 medical evidence did not support Dr. Drinkwater's findings that Plaintiff had a limited
22 ability to climb, balance, stoop, kneel, crouch or crawl. [*Id.*].

23 The ALJ is responsible for evaluating the opinions of each doctor, resolving
24 conflicts in the medical testimony, and resolving ambiguities. Morgan v. Social Sec.
25 Admin., 169 F.3d 595, 601 (9th Cir. 1999); Reddick, 157 F.3d at 722; Andrews v.
26 Shalala, 53 F.3d at 1035, 1039 (9th Cir. 1995). The degree of weight given to a
27 particular physician's opinion depends on a variety of factors. Among the relevant
28 factors to be considered are the relationship between the physician and patient, the

length and extent of treatment, the physician's specialty, and the support for the physician's opinion in the medical record. 20 C.F.R. § 404.1527(d); see also Andrews, 53 F.3d at 1035, 1041 (discussing the weight to be given to different types of physicians' opinions). More weight is given to a treating physician's opinion than to the opinion of a non-treating physician, and greater weight is accorded to the opinion of an examining physician than to the opinion of a non-examining physician. Andrews, 53 F.3d at 1040-41. The ALJ may reject an uncontroverted opinion of a treating physician only for clear and convincing reasons. Id. at 1041; Magallanes, 881 F.2d at 751. Similarly, "the Commissioner must provide 'clear and convincing' reasons for rejecting the uncontradicted opinion of an examining physician." Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996) (as amended) (citing Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir.1990)). Further, "like the opinion of a treating doctor, the opinion of an examining doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record." Id. at 830-831 (citing Andrews, 53 F.3d at 1043).

Here, Plaintiff and Defendant agree that the record does not support the ALJ's rejection of Dr. Drinkwater's testimony. Plaintiff posits that "the ALJ's rejection of Drinkwater's assessment, based on the ALJ's opinion that Drinkwater's evaluation showed 'minimal clinical abnormalities' was beyond the ALJ's ken." [Doc. 15 at 7]. Defendant states that the medical evidence was insufficient to allow the ALJ to "adequately evaluate the severity of Plaintiff's alleged physical impairment and its functional effects." [Doc. 22 at 4].

The Court agrees with the parties that the ALJ's reasons for rejecting Dr. Drinkwater's opinion were insufficient. In rejecting Dr. Drinkwater's opinion, the ALJ stated that Dr. Drinkwater's assessment of Plaintiff's abilities was inconsistent with his evaluation, "which showed minimal clinical abnormalities," [Doc. 6A at 20], and that the objective medical evidence did not support the other limitations noted by Dr. Drinkwater. [Id.]. The ALJ did not, however, provide any explanation of how Dr.

1 Drinkwater's opinion was inconsistent with the medical evidence. The ALJ must set
2 out in the record his reasoning and the evidentiary support for his interpretation of
3 the medical evidence. See Tackett, 180 F.3d at 1102; see also Lester, 81 F.3d at
4 832 (ALJ may not reject treating and examining physicians' opinions based on
5 unsupported speculation).

6 The ALJ further stated that there was "no reason" to limit Plaintiff's ability to
7 lift and carry, and observed that "because the claimant is right-hand dominant, she
8 can use her left hand for assisting during lifting and carrying." [Doc. 6A at 20-21].
9 By speculating that Plaintiff's right-hand dominance would allow her to perform more
10 activities than those observed by Dr. Drinkwater, without pointing to any medical
11 evidence, the ALJ effectively substituted his belief for the opinion of a medical
12 source. Sheer disbelief in a doctor's opinion is no substitute for substantial
13 evidence. Benecke, 379 F.3d at 594; see also Lester, 81 F.3d at 382. For these
14 reasons, the Court agrees with the parties that the ALJ's opinion was not supported
15 by specific reasons or substantial evidence.

16 **(b). Plaintiff's Subjective Complaints**

17 The ALJ also found that Plaintiff was less than fully credible and may have
18 exaggerated her symptoms. It is within the province of the ALJ to make credibility
19 determinations. To discredit a claimant's testimony, and ALJ must provide specific,
20 cogent reasons supported by substantial evidence. Reddick, 157 F.3d at 722. The
21 ALJ may not reject a claimant's testimony without specifically identifying the portions
22 of the testimony found not credible and explaining what evidence contradicts or
23 undermines the testimony. Aukland v. Massanari, 257 F.3d 1033, 1036 n.1 (9th Cir.
24 2001); Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001); Reddick, 157 F.3d at
25 722. An ALJ's credibility findings must be sufficiently specific to allow a reviewing
26 court to conclude that the hearing officer rejected the testimony on permissible
27 grounds rather than arbitrarily discrediting it. Rollins, 261 F.3d at 856. Where there
28 is no affirmative evidence of malingering, the ALJ's reasons for rejecting the

1 claimant's testimony must be clear and convincing. Reddick, 157 F.3d at 722;
2 Lester, 81 F.3d at 834.

3 In determining whether allegations of pain support a claim of disability, the
4 ALJ may consider various factors, including: the claimant's daily activities,
5 effectiveness of pain medication, and relevant character evidence. Bunnell v.
6 Sullivan, 947 F.2d 341, 346 (9th Cir. 1991); see also 20 C.F.R. §§ 404.1529(c)(3),
7 416.929(c)(3)(listing similar factors considered by the ALJ in assessing a claimant's
8 credibility). In addition, the ALJ must consider the claimant's work record,
9 observations of treating or examining physicians and other third parties, precipitating
10 and aggravating factors, and functional restrictions caused by the claimant's
11 symptoms. Smolen, 80 F.3d at 1284 (citing SSR 88-13); Bunnell, 947 F.2d at 346.

12 Here, the ALJ observed that Plaintiff was shot in 2000, and progress notes
13 indicated that she reported pain and weakness in her arm in February of 2002.
14 [Doc. 6A at 20]. However, the ALJ found that Plaintiff's reported symptoms may
15 have been exaggerated and did not support a finding of disability. The ALJ further
16 concluded that there was no objective evidence to support Plaintiff's complaints that
17 she had limited use of her left arm and hand. [Id.].

18 The Court finds that the ALJ properly observed that Plaintiff's reports of arm
19 pain did not support a finding of disability. In making this determination, the ALJ
20 specifically pointed to Plaintiff's statement that her pain was severe enough that she
21 had to "drink[] pain pills." [Id.]. He contrasted this with her admission to Dr.
22 Drinkwater that her pain was relieved with over-the-counter medication and the fact
23 that she attended physical therapy only once. [Id.]. He then concluded that
24 Plaintiff's complaints were inconsistent with a finding of disabling pain. [Id.]. He also
25 considered Plaintiff's ability to engage in activities of daily living, such as diapering
26 and feeding her child. The ALJ acted within his powers in making these
27 determinations. See e.g., Bunnell, 947 F.2d at 346 (ALJ may consider effectiveness
28 of pain relief and inadequately explained failure to follow a course of prescribed

1 treatment as well as daily activities in assessing credibility); Tidwell v. Apfel, 161
2 F.3d 599, 602 (9th Cir. 1999)(citing claimant's assertion that her intermittent pain was
3 aided by use of non-prescription medication as clear and convincing reason
4 supporting the ALJ's credibility finding).²

5 In contrast, the ALJ's finding that Plaintiff's complaints about the limited use
6 of her left arm was unsupported by any objective medical findings lacks substantial
7 support. As explained above, the ALJ failed to give proper weight to the opinions of
8 Dr. Drinkwater regarding Plaintiff's limited ability to use her left hand. The ALJ also
9 improperly speculated that Plaintiff's right-hand dominance allowed her to perform
10 a wider range of activities than those recognized by the medical examiner. The
11 ALJ's error regarding these issues permeated his assessment of Plaintiff's credibility,
12 as evidenced by his conclusion that there was no medical evidence to support her
13 claims.³ Because the ALJ's reasoning was predicated on underlying error, his
14 determination that the Plaintiff's alleged limitations were totally unsupported by
15 objective findings was also in error.

16
17 ² Plaintiff argues that the ALJ's determination was in error, in part,
18 because Plaintiff did not allege that her arm pain was itself disabling.
19 Instead, Plaintiff argues, her arm condition contributed to her overall
20 disability. [Doc. 13 at 13]. However, even accepting Plaintiff's argument
21 that the ALJ's conclusion was an adverse credibility finding based on
22 a misconstruction of the issue presented, Plaintiff would suffer no
23 prejudice. If Plaintiff's testimony were credited, the Court would be
24 required to accept Plaintiff's contention that Plaintiff suffered some arm
25 pain, even though the pain was not itself disabling. The ALJ's opinion
26 is consistent with this proposition.

27 ³ The ALJ also alluded to the fact that Plaintiff reported being in
28 "excellent health" in October of 2002. This observation does not alter
the Court's conclusion. See, e.g., Reddick, 157 F.3d at 724 (observing
that a person overstating her ailments would be unlikely to advise her
doctors when she was feeling better); Holohan, 246 F.3d at 1205 (the
fact that a claimant shows signs of improvement does not mean that
the person's impairments no longer seriously affect her ability to
function in a workplace).

1 **(c). Remand**

2 Having found error, this Court must determine whether to remand for further
3 consideration or for the award of benefits. McCartey v. Massanari, 298 F.3d 1072,
4 1076-77 (9th Cir. 2002); Holohan v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001).
5 As noted above, a remand for an award of benefits is only appropriate if there are
6 no outstanding issues to resolved, and the record clearly indicates that the ALJ
7 would be required to find the claimant disabled were the rejected evidence credited.
8 Smolen, 80 F.3d at 1292.

9 Although Dr. Drinkwater noted some limitations on the evaluation form
10 assessing Plaintiff's abilities, these limitations do not clearly indicate that Plaintiff's
11 arm injury caused significant work-related limitations. Additionally, although Dr.
12 Drinkwater's report indicated that Plaintiff had an underlying impairment, he did not
13 make any statements indicating that Plaintiff's limitations were significant. While it
14 was improper for the ALJ to reject Dr. Drinkwater's opinion based on speculation that
15 Plaintiff's ability to use her right hand allowed her to perform a wide range of
16 activities, the Court believes further exploration of the question whether the
17 limitations noted by Dr. Drinkwater impose significant limitations is required.

18 Additionally, the Court is unsatisfied that the portion of Plaintiff's testimony that
19 was rejected by the ALJ as objectively unsupported clearly establishes disability.
20 This is especially true in light of the ALJ's other supportable credibility findings. This
21 issue is most appropriately considered on remand.

22 **2. Plaintiff's Mental Impairments**

23 The Court next considers whether the impairments Plaintiff suffered as a result
24 of her mental condition were significant enough to meet the requirements of §
25 12.05C. In connection with assessing Plaintiff's abilities, the ALJ considered the
26 opinions of consultative examiners Robert J. Henley, Ph.D., and Sandra Graff,
27 Ed.D., as well as the opinion of Dr. Edward Jasinski, Ph.D., a medical expert who
28 testified at the hearing. On June 11, 2002, Dr. Henley diagnosed Plaintiff as having:

1 a dysthymic disorder, borderline intellectual functioning, dependent personality traits,
2 hypertension (by claimant report), and history of a gunshot wound to the arm. [Doc.
3 6A at 143]. He opined that she would be moderately limited in her ability to cope
4 with work stresses, be moderately impaired in job reliability, mildly impaired in
5 maintaining attention and concentration during the work day, and have a limited but
6 satisfactory ability to deal with co-workers and supervisors. [Id. at 144]. Dr.
7 Jasinski opined that Plaintiff's limitations were not "significant" under § 12.05C, but
8 testified that Plaintiff's abilities were moderately impaired with respect to the areas
9 of social functioning, concentration, persistence and pace, and that her daily
10 activities were mildly impaired. [Doc. 6A at 322-23]. Dr. Graff's assessment
11 revealed significant limitations. She diagnosed Plaintiff as having: a recurrent and
12 severe depressive disorder ("rule out" psychotic features and posttraumatic stress
13 disorder), a reading disorder, a mathematics disorder, a disorder of written
14 expression, and mild mental retardation. Dr. Graff opined that Plaintiff had markedly
15 limited abilities in an extensive number of areas related to her ability to perform
16 work-related tasks. [Doc. 6A at 216].

17 Based on the opinion of Dr. Henley and the testimony of Dr. Jasinski, the ALJ
18 determined that Plaintiff had borderline intellectual functioning. The ALJ relied on
19 Dr. Jasinski's testimony to conclude that Plaintiff had a depressive disorder not
20 otherwise stated.⁴ [Id.]. The ALJ concluded that Plaintiff's borderline intellectual
21 functioning was a severe impairment, but that her depression was not severe for a
22 period of twelve consecutive months. In reaching these conclusions, the ALJ
23

24 ⁴ The ALJ assigned less weight to the portion of Dr. Jasinski's opinion
25 relating to Plaintiff's ability to function in the workplace, ability to engage
26 in daily activities ability to engage in social interactions, and the effects
27 of her impairments on her concentration, persistence and pace. The
28 ALJ stated that this portion of Dr. Jasinski's opinion could not be
afforded great weight because the doctors had not had an opportunity
to review certain treatment records. [Doc. 6A at 22].

1 rejected the opinions of Dr. Graff, who diagnosed Plaintiff as being mildly mentally
2 retarded and as having a recurrent and severe depressive disorder. [Doc. 6A at 21-
3 23]. The ALJ observed that, due to depression, Plaintiff's functioning appeared to
4 be more impaired at the time she saw Dr. Graff than at the time she saw Dr. Henley.
5 [Id.]. However, the ALJ concluded that Dr. Graff's opinion was not supported by the
6 evidence as a whole. [Id.]. The ALJ further observed that, although Plaintiff had
7 significant depression in December of 2002, her depressive symptoms improved
8 with medication and therapy such that her symptoms were only "mild" by February
9 of 2002. [Id.].

10 Plaintiff now contends that a finding of disability should be directed because
11 the opinions of Drs. Graff and Henley, as well as Plaintiff's treatment records from
12 Southwest Behavioral Health Services, conclusively demonstrate that she suffered
13 significant work-related mental limitations. Plaintiff observes that each evaluator
14 found that she suffered more than minimal impairments. [Doc. 13 at 8 (citing Doc.
15 14 at ¶¶ 7,8,9)].

16 Plaintiff's argument is problematic for two reasons. First, Plaintiff's argument
17 fails to account for the ALJ's determination that, while Plaintiff suffered from severe
18 depression for at least some period of time, the record did not support a conclusion
19 that her depression lasted for a continuous period of at least twelve months.⁵ The
20 ALJ acknowledged Dr. Graff's September 2002 assessment of recurrent and severe
21 depression. [Doc. 6A at 21-23]. The ALJ further observed that on, December 18,
22 2002, Plaintiff's treating doctor assigned her a Global Assessment Functioning
23

24 ⁵ 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00 A provides that: "[The
25 evaluation of disability on the basis of mental disorders requires
26 documentation of a medically determinable impairment(s),
27 consideration of the degree of limitation such impairment(s) may
28 impose on your ability to work, and consideration of whether these
limitations have lasted or are expected to last for a continuous period
of at least 12 months."

1 ("GAF") score of 50, which represents "serious" symptoms. [Id. at 23]. The ALJ
2 found, however, that Plaintiff's treatment notes indicated significant improvement by
3 February of 2003 and that she continued to improve at least through July of 2003.
4 [Id. at 22-23].

5 The record supports the ALJ's determinations. Between September of 2002
6 and July of 2003, Plaintiff's GAF score continued to improve. [See Doc. 6A at 215,
7 226, 229, 234, 240, 255]. By July of 2003, she had a GAF score of 65, which
8 Plaintiff acknowledges represents mild symptomology. [Doc. 6A at 226; Doc. 14 at
9 12]. Thus, even if Plaintiff's depression were dated from Dr. Graff's report in
10 September of 2002, her symptoms would have existed for less than a continuous
11 twelve month period.⁶ The ALJ's determination was proper.

12 Moreover, although it is true that doctors Henley, Graff, and Jasinski each
13 reported that Plaintiff suffered limitations that were at least moderate in severity,
14 Plaintiff does not distinguish between findings that may have been based on her IQ
15 level from findings that were related to her depression. The distinction is significant
16 because §12.05C requires a showing that Plaintiff not only suffered impairments as
17 a result of her IQ, but also suffered an impairment imposing an *additional* and

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19 ⁶ The Court observes that Dr. Henley's opinion is dated June 11, 2002,
20 more than twelve months prior to the date Plaintiff's treating physician
21 indicated that she had a GAF score of 65. His opinion included a
22 diagnosis of dysthymic disorder, which is defined in the DSM IV as
23 including "a chronically depressed mood that occurs for most of the day
24 more days than not for at least two years." [Doc. 14 at 8]. Dr. Henley
25 further observed that Plaintiff had a history of chronic depression. He
26 stated in his assessment, however, that Plaintiff's depression was
27 situational in nature and did "not preclude normal daily functioning."
28 [Doc. 6A at 142]. The Court is unpersuaded that Dr. Henley's opinion
clearly establishes that Plaintiff's depression or dysthymic disorder
significantly limited her work-related abilities as of the date of the
opinion. Thus, even assuming Dr. Henley's assessment is sufficient to
raise a question about the extent of Plaintiff's depression, a remand for
an award of benefits would not be warranted. At a minimum, further
proceedings would be required. See Smolen, 80 F.3d at 1292.

1 significant work-related limitation of function. To the extent Plaintiff's limitations
2 resulted from her low IQ, they would not impose an additional limitation.

3 Notably, the ALJ did analyze Plaintiff's depression apart from her IQ,
4 observing that only Dr. Graff found Plaintiff's depression to be recurrent and severe.
5 The ALJ ultimately determined that Dr. Graff's assessment was outweighed by the
6 overall medical evidence. He instead relied on the assessments of Drs. Henley and
7 Jasinski, which indicated that Plaintiff's depression had a lesser effect on Plaintiff's
8 ability to function. The ALJ was entitled to resolve any conflict between opinions of
9 equal weight. Morgan, 169 F.3d at 601 ("where medical reports are inconclusive,
10 questions of credibility and resolution of conflicts in the testimony are functions solely
11 of the Secretary"); see also Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984).

12 Notwithstanding this determination, however, the Court finds that a remand
13 for further proceedings regarding Plaintiff's mental impairments is appropriate. The
14 ALJ summarized Plaintiff's allegations of mental impairments as including
15 "depression, anxiety, and an ability to read or write." [Doc. 6A at 21]. Yet, an
16 analysis of the effects of Plaintiff's anxiety on her ability to function is noticeably
17 absent from the ALJ's opinion. As Defendant concedes, Plaintiff's anxiety order was
18 well documented in her treatment notes by Dr. Benton Press. [Doc. 22 at 6]. It is
19 unclear whether her anxiety would amount to a significant limitation on her work-
20 related abilities. Additionally, Defendant concedes that because Drs. Henley,
21 Jasinski, and Graff did not have an opportunity to review Plaintiff's treatment
22 records, they did not have an opportunity to assess whether Dr. Press's diagnoses
23 of an anxiety disorder would affect Plaintiff's functional limitations. The Court agrees
24 with Defendant that further assessment of the effects of Plaintiff's anxiety disorder
25 on her depression and functional abilities would be appropriate on remand.

26 **B. Plaintiff's Remaining Arguments**

27 Plaintiff additionally argues that the ALJ erred at step four of the sequential
28 evaluation process by: (1) conducting a global assessment of her residual functional

1 capacity rather than conducting a function-by-function assessment, and (2) relying
2 on the Dictionary of Occupational Titles (DOT)⁷ to conclude that she could return to
3 her past work as a janitor. [*Id.* at 9-11]. Although the Plaintiff's arguments are well-
4 taken, the ALJ's errors at steps two and three of the sequential evaluation process
5 vitiate the ALJ's step four analysis. If the ALJ reaches step four on remand, it will
6 be necessary to re-assess Plaintiff's RFC and to determine whether she can perform
7 her past relevant work.

8 **C. Conclusion**

9 For the foregoing reasons, this matter will be remanded for further
10 proceedings. On remand, the ALJ should determine whether Dr. Drinkwater's
11 findings, when credited, establish that Plaintiff's arm injury caused significant work-
12 related limitations as required under §12.05C. Additionally, the ALJ should
13 reassess, in light of Dr. Drinkwater's evaluation, the portion of Plaintiff's testimony
14 relating to her arm injury that was rejected by the ALJ as unsupported by the
15 objective evidence. With regard to Plaintiff's mental limitations, the ALJ should
16 consider whether Plaintiff's anxiety disorder, independently or in combination with
17 her other alleged impairments, amounts to a significant limitation on her work-related
18 abilities. Among the relevant issues to be considered is whether the moderate
19 limitations noted by the treating and evaluating doctors resulted from Plaintiff's
20 anxiety and or depression apart from the limitations resulting from her IQ. In making
21 the aforementioned assessments, the ALJ should obtain additional medical records
22 and opinions as necessary.

23 If Plaintiff's mental or physical limitations are found to be additional and
24 significant work-related limitations, she must be awarded benefits. Otherwise, the
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26

27 ⁷ DICTIONARY OF OCCUPATIONAL TITLES (DOT)(United States Dept. of Labor,
28 4th Ed. 1991), *available at* www.oalj.dol.gov/libdot.htm

1 ALJ should continue with the sequential evaluation process, assessing the Plaintiff's
2 RFC in a manner consistent with this Court's findings.

3 **IT IS THEREFORE ORDERED granting in part and denying in part**
4 Plaintiff's Motion for Summary Judgment [Doc. 13];

5 **IT IS FURTHER ORDERED granting** Defendant's Motion for Remand [Doc.
6 21];

7 **IT IS FURTHER ORDERED remanding** this matter to the Social Security
8 Administration for further proceedings.

9 DATED this 12th day of December, 2005.

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14 Morton Sitver
United States Magistrate Judge
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